

UNITED STATES OF AMERICA

v.

AHMED KHALFAN GHAILANI

Defense Response

To Government Request for 120-Day
Continuance in the Interests of Justice

23 January 2009

1. **Timeliness**: This response is timely filed in accordance with Rule 3 paragraph 6(b)(1) of the Military Commissions Trial Judiciary Rules of Court issued on 2 November 2007.
2. **Relief Sought**: The Defense respectfully requests that the military judge deny the government's request for a continuance.
3. **Overview**: Under the circumstances articulated by the government, a continuance is neither appropriate nor consistent with the interests of justice, and is in conflict with the Executive Order of 22 January 2009 issued by the President. The uncertainty and indefiniteness of the government's request make it clear the government is either unable or unwilling to bring the accused to trial in an expeditious manner. Accordingly, pursuant to R.M.C. 707(d)(1), the only appropriate remedy under the circumstances is a dismissal of all charges.
4. **Burden and Standard of Proof**: As the moving party, the burden of persuasion rests with the government to demonstrate that the requested continuance is required in the interests of justice.
5. **Facts**: The Defense offers the following additional facts:
 - a. On 16 December 1998, Mr. Ghailani was indicted by the United States District Court for the Southern District of New York (SDNY) for his alleged role in the bombing of the United States embassy in Tanzania. To date, Mr. Ghailani remains indicted in the SNDY.

b. In July 2004, Mr. Ghailani was captured by Pakistani authorities and has remained in continuous detention ever since.

c. In September 2006, Mr. Ghailani was transferred to Guantanamo Bay for detention.

d. On 20 October 2008, in the government's response to a Defense Motion for Appropriate Relief (Proposed Trial Schedule) (AE-15) the government indicated that it was prepared to proceed to trial in accordance with the timing requirements of R.M.C. 707(a)(2).

e. On 22 October 2008, at Mr. Ghailani's arraignment, the government again announced on the record that they were prepared to go to trial within the 120-day time period articulated in R.M.C. 707(a)(2).

f. On 26 November 2008, the military judge issued a detailed trial schedule contained in AE-16.

g. Pursuant to the trial schedule set by the military judge, discovery in this case has been ordered to be complete by 2 February 2009.

h. On 17 November 2008, the Defense filed D-001 (Motion to Modify Protective Order #1). To date, a ruling on this motion is still pending.

i. On 8 December 2008, the Defense filed a request with the Convening Authority for appointment of a Privilege Team. This request was denied by the Convening Authority on 12 January 2009.

j. On 12 December 2008, the Defense filed a request with the Convening Authority for appointment of an expert consultant in the form of a forensic social worker. This request was denied by the Convening Authority on 5 January 2009.

k. On 22 January 2009, the President of the United States issued an Executive Order subject: REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT THE GUANTANAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES.

6. Discussion:

The fact that this request for a continuance comes apparently at the direction of the President of the United States and the Secretary of Defense does not change the analysis that the military judge must apply in this case. However noble the goals of the President and the Secretary may be, a continuance is not the proper means to achieve these ends. Furthermore, the government's request for a continuance, on its face, is in direct conflict with the order of the President. The President's Executive Order of 22 January 2009, directs the Secretary of Defense to take steps to "halt" the proceedings ... not to take steps to "continue" them as the prosecution so requests.

Mr. Ghailani was indicted in the SDNY over ten years ago. Upon his capture in 2004, the United States government could have immediately taken him to the SDNY to face a Federal trial. Instead, insisting on a military commissions case, the government has needlessly incarcerated Mr. Ghailani for over four years with no opportunity to face the charges against him. Given the history of this case and the choices the government has made regarding his prosecution, no amount of laudable goals on the part of the President excuses further delay in giving Mr. Ghailani his day in court. The government has made a charging decision in Mr. Ghailani's case. The interests of justice require that the government either be compelled to move forward on that charging decision, or that the charges be dismissed. The government can not be allowed to have it both ways; particularly when it operates to the prejudice of Mr. Ghailani in his case.

In the context of speedy trial, our Supreme Court has assessed prejudice in the light of the interests of defendants which the speedy trial right was designed to protect. “This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” Barker v. Wingo, 407 U.S. 514, 532 (1972). The Court went on to point out that

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Id. at 532-533. Again, Mr. Ghailani has been incarcerated for over 4 years. We challenge the prosecution to explain to this commission how Mr. Ghailani has not already suffered substantial prejudice and how that prejudice will not be exasperated by approval of their requested continuance.

Under these circumstances, the military judge has an affirmative duty to intervene. As then-Chief Judge Crawford pointed out,

[a]fter arraignment, "the power of the military judge to process the case increases, and the power of the [Government] to affect the case decreases." Doty, 51 M.J. at 465-66. As a result, once an accused is arraigned, significant responsibility for ensuring the accused's court-martial proceeds with reasonable dispatch rests with the military judge. ***The military judge has the power and responsibility to force the Government to proceed with its case if justice so requires.***

United States v. Cooper, 58 M.J. 54, 60 (2003) (emphasis added). When assessing what justice requires, we respectfully request the military judge consider the following questions:

a) During the requested time period, will the government be required to continue to adhere to its discovery obligations and comply with the discovery schedule previously set by the military judge?

b) During the requested time period, will the military judge continue to regulate discovery as required by R.M.C. 701(l)?

c) During the requested time period, will the military judge issue a ruling on D-001?

d) During the requested time period, will the military judge entertain and rule on motions by the defense for appropriate relief, for example the appointment of a privilege team, the appointment of a forensic social worker, or the failure of the government to comply with its discovery obligations?

If the answer to any of the above questions is “no”, then Mr. Ghailani’s ability to defend himself against these pending charges is not only impaired ... it is impossible.¹ Allowing Mr. Ghailani to once again be placed into a position of legal limbo with pending charges *in two federal courts*, and no avenue of redress, as the government would have this commission do, is contrary to the interests of justice and intolerable.

In October 2008, the prosecution in this case announced on the record that they were ready to proceed to trial in this case by 7 February 2009. Now, in their continuance request, the prosecution tells us that not only are they not ready to proceed to trial, they are not confident that this case will ever go to trial. The prosecution has attempted to disguise this filing as a specific request for a 120-day continuance, but the uncertainty and indefinite nature of their request is apparent in their argument. A continuance is appropriate where either party can adequately demonstrate to the military judge that additional time is necessary, i.e. in the interests of justice,

¹ It is clear from the prosecution’s motion that their answer to each of these questions is “no.”

to prepare their case for trial. *See United States v. Miller*, 47 M.J. 352, 358 (1997) and the discussion to R.M.C. 906(b)(1) for factors the military judge should consider on the appropriateness of a continuance. Here, the government is not claiming the unavailability of a witness, the need to adjust the trial schedule in order to try a related case, or the unavailability of a party to this commission. Further, and most importantly, the government can offer the commission no assurances whatsoever that they will be prepared to move forward in Mr. Ghailani's case at the conclusion of the requested 120-day period. The United States Government is responsible for incarcerating Mr. Ghailani for over four years with no opportunity to defend himself. A change in President and Executive administration does not relieve the United States of its obligation to act with reasonable dispatch. Under these circumstances, the requested continuance and the complimentary request for exclusion of delay are neither appropriate nor consistent with the interests of justice. It is clear the government can not comply with its obligations under the United States Constitution and R.M.C. 707. The only appropriate remedy, under these circumstances, is dismissal of all charges pursuant to R.M.C. 707(d)(1).

Finally, any suggestion that the President's Executive Order render's the military judge powerless to do anything regarding the charges before this commission interjects at a minimum, the specter of apparent unlawful command influence.² It is one thing for the President or the Secretary of Defense to lawfully exercise his authority to "reach down" and take control of a case and order charges dismissed. However, it is an entirely different and inappropriate thing for

² Unlawful command influence is the improper interference with the commission process and has been characterized by our courts as "the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (CMA 1986). In *United States v. Biagase*, 50 M.J. 143 (1999), the Court of Appeals for the Armed Forces set out the analytical framework for resolving claims of unlawful command influence. The courts have placed the responsibility on the military judge "to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Stoneman*, 57 M.J. 35, 43, (2002) *quoting United States v. Rosser*, 6 M.J. 267, 271 (CMA 1979). Likewise, the courts have recognized the military judge's duty to act as the "last sentinel" to protect proceedings from unlawful command influence and have endorsed proactive remedies by the court to ameliorate it. *Biagase*, 50 M.J. at 152, *see also Thomas*, 22 M.J. at 400.

the President or the Secretary of Defense to interject himself into an ongoing proceeding and direct the military judge to take a specific action in that proceeding; particularly where this action operates to the legal prejudice of the accused. It is important to note that it is not the President's order that causes the Defense concern here; rather it is the government's attempt to execute the President's order that is troubling. If the government is suggesting that the military judge's hands are tied here, then the fairness of these proceedings and the confidence of the general public in the same are entirely undermined. Such an unlawful appearance can not be perpetuated by granting the government's continuance request. The President has ordered that these proceedings be halted. There is an appropriate and lawful manner to comply with that order: dismissal of all charges.

7. Request for Oral Argument: Unless the military judge is prepared to order a dismissal of all charges, the Defense respectfully requests oral argument on this motion. The Defense recommends that this motion be addressed during the week of 23 February 2009, which the military judge has previously set aside to address discovery motions.

8. Witnesses: None.

9. Conference with Opposing Counsel: Not required.

10. Attachments:

A. Story from BBC News: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3938267.stm>, accessed on 22 January 2009.

B. Defense Request for Appointment of Privilege Team of 8 December 2008.


C. Convening Authority's denial of Defense Request for Privilege Team of 12 January 2009.

D. Defense Request for Approval of a Forensic Social Worker of 12 December 2008.

E. Convening Authority's denial of Defense Request for a Forensic Social Worker of 5
January 2009.

Respectfully submitted,

By: //Signed electronically//
LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions



ATTACHMENT (A)



Profile: Ahmed Khalfan Ghailani

Ahmed Khalfan Ghailani has been charged with war crimes in relation to the US embassy bombing in Tanzania in 1998, which killed 11 people and left dozens injured.

Mr Ghailani, a Tanzanian, was arrested in Pakistan in July 2004 and handed over to the US at the beginning of 2005.

He was one of 14 detainees transferred in September 2006 from secret CIA prisons abroad to the Guantanamo Bay prison camp in Cuba.

Charges brought by the Pentagon include murder, attacking civilians, conspiracy and providing material support to terrorism.

The Pentagon is seeking the death penalty if the conviction is successful.

According to the transcript of a closed-door hearing in March 2007, Mr Ghailani admitted delivering explosives used to blow up the US embassy in Tanzania in 1998.

However, Mr Ghailani said he did not know about the attack beforehand and apologised to the US government and the victims' families, according to a transcript of the hearing.

'Fresh plot'

A short, squat man in his 30s, Mr Ghailani goes by dozens of aliases, including "Foopie" and "Ahmed the Tanzanian".

His baby-faced photograph used on the FBI's list of most-wanted terrorist suspects belied the severity of the charges on which he was indicted by New York authorities in 1998.

The Tanzanian national is accused of buying the truck that carried the bomb used in the Dar es Salaam attack, in which 11 people died.

He and his accomplices are also accused of buying oxygen and acetylene tanks used to enhance the force of the explosion.

Neil Livingstone of the US-based international risk management company Global Options called him a "very important figure" who was number eight on the FBI's most wanted list.

Dr Livingstone told the BBC that Mr Ghailani was probably sent to east Africa at the time of the bombings by Osama Bin Laden's second-in-command, Ayman al-Zawahiri.

In May 2003, the FBI named Mr Ghailani on a list of seven people it suspected of concocting a fresh al-Qaeda plot, and increased the bounty on his head to \$5m.

On 25 July 2004 he was arrested in Pakistan along with his Uzbek wife.

Support network

According to the US transcript, Mr Ghailani admitted visiting an al-Qaeda training camp in Afghanistan after the bombings. But he denied being a member of al-Qaeda.

Dr Livingstone said he had probably gone to Pakistan because he was wanted around the world, and because al-Qaeda has a support network there.

Pakistani officials at the time said Mr Ghailani's arrest was the most significant since the detention in March 2003 of Khalid Sheikh Mohammed, the suspected mastermind of the 11 September attacks on the US.

He is thought to have been born on the Tanzanian island of Zanzibar in 1970 or 1974 - making him 30 or 34 years old. He is said to speak fluent Swahili and English.

It is suggested that he fled to Afghanistan after being indicted in 1998.

According to a British newspaper, he was in the Liberian capital, Monrovia, in 2001, with another suspect in the embassy bombings, a Kenyan man Fazul Abdullah Mohammed.

The UK's Observer newspaper reported in 2002 that the two men allegedly ran a lucrative al-Qaeda financing operation, trading illegal "blood diamonds" for cash.

The paper said the operation ran into trouble in June 2001, when reports reached al-Qaeda that Mr Ghailani and Mr Mohammed were lavishing money on women, presents and alcohol.

Story from BBC NEWS:

<http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3938267.stm>

Published: 2008/03/31 16:13:45 GMT

© BBC MMIX

ATTACHMENT (B)



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

8 December 2008

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Request for Appointment of Privilege Team - *United States v. Ahmed Khalfan Ghailani*

References: (a) Protective Order #1 *ico United States v. Ahmed Khalfan Ghailani*
(b) D-001 Defense Motion to Modify Protective Order #1
(c) *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. November 8, 2004)
(d) *In re Guantanamo Bay Detainee Litigation*, 2008 U.S. Dist. LEXIS 69254 (D.D.C. September 11, 2008)

1. The Defense respectfully requests that a privilege team be appointed to assist the Defense in the above named case. We request that this privilege team be independent from your office and that of the prosecution, in order to allow us to submit attorney-client privileged information to the designated privilege team for review. The sole purpose of this request is to allow us to provide adequate legal representation to Mr. Ghailani; however, we note that attachment (1) contains a May 29, 2008 e-mail request to you from the then Chief Defense Counsel, Office of Military Commissions (OMC) seeking appointment of a privilege team to support the entire OMC-Defense mission. This request received a favorable recommendation from both the Joint Task Force – Guantanamo and from the U.S. Southern Command. It is our understanding that, to date, this request has not been formally acted upon.

2. Reference (a) currently provides that “the statements of the Accused are to be presumptively treated as classified information, classified at the TOP SECRET//SCI level.” While the Defense has reason to believe that a majority of the statements of the accused are not classified at all, or at least not classified at the TS/SCI level, there is no mechanism in place to allow us to overcome the TS/SCI presumption. This means that any notes we take during our meetings with Mr. Ghailani are presumptively TS/SCI material and therefore we can not act upon any of the information that we receive from him. For example, if Mr. Ghailani were to provide us the name of a potential witness to contact, even the name of a family member, we could not act upon that information because it is presumptively classified at the TS/SCI level. This situation prevents the Defense from being able to provide Mr. Ghailani the adequate assistance of counsel that he is entitled.

3. In reference (b), the Defense has already requested, in part, to remove the presumption contained in paragraphs 6g and paragraph 26 [of Protective Order #1] that all statements by the Accused are classified at the TOP SECRET/SCI (TS/SCI) level and replace [REDACTED]

[REDACTED] This motion is still pending with the military judge; however, in their response to this motion the prosecution has objected to removal of the presumption and argued that the military judge has no authority to either remove or modify the presumption. If this presumption must remain, appointment of the requested privilege team would at least provide the Defense a mechanism to overcome this presumption.

4. We believe that our request is neither unreasonable nor novel. In references (c) and (d), a privilege team has been appointed to assist the defense in all of the detainee habeas petitions in the United States District Court for the District of Columbia. As you probably already know, this privilege team is "[a] team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee." Reference (b) at p. 184. It is our understanding that the current habeas privilege team is comprised of mostly contract employees who possess past intelligence and/or law enforcement experience with the federal government. While you are certainly at liberty to grant our request in any fashion you deem appropriate, we believe that leveraging off of the existing habeas privilege team makes the most sense. The team already exists, has resources in place, has relevant experience in the areas we seek assistance, and has an existing contractual vehicle to obligate funding against. Our request may be accommodated with minimal additional investment in resources and funding.

5. In closing, we believe that appointment of the requested privilege team is essential in order to provide Mr. Ghailani adequate legal representation, will help avoid future delays in this case, and, from the government's perspective, will add an additional layer of protection for the handling of classified information in this case. We respectfully request a written response to this request. We welcome the opportunity to discuss this request with you or your legal advisor in person. I may be contacted at: [REDACTED]
[REDACTED]

Respectfully submitted,

By: 

LTCOL J.P. COLWELL, USMC

MAJ R.B. REITER, USAFR

Detailed Defense Counsels for

Ahmed Khalfan Ghailani

Office of the Chief Defense Counsel

Office of Military Commissions
[REDACTED]

Attachment:

1. CDC email re: Privilege Teams-Classification Teams of 29 May 08 w/ ends

ATTACHMENT (1)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (C)



CONVENING AUTHORITY

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

JAN 12 2009

MEMORANDUM FOR: LtCol J.P. Colwell, USMC, Defense Counsel, OMC
MAJ R.B. Reiter, USAFR, Defense Counsel, OMC

SUBJECT: Request for Appointment of Privilege Team – *United States v. Ahmed Khalfan Ghailani*

I reviewed your letter dated 8 December 2008 requesting appointment of a privilege team in the case of *United States v. Ahmed Khalfan Ghailani*. There are procedures in place in the Military Commissions system, similar to the federal system, whereby counsel may receive advice on security matters from Court Security Officers (CSO). There are currently five CSOs in the Military Commission organization which defense counsel may call upon for guidance on classification matters. Further, a Special Security Officer (SSO) provides an additional layer of support for the defense teams. When necessary, the defense SSO can interface with the appropriate Original Classification Authorities (OCA) to request further guidance on your behalf. Because there are existing procedures for dealing with classified information, I am not persuaded that it is necessary to appoint a privilege team. Therefore, your request is denied.

Susan J. Crawford
Convening Authority
for Military Commissions



ATTACHMENT (D)



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

12 December 2008

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Request for Expert Consultant [REDACTED], *United States v. Ghailani*

1. The Defense in *United States v. Ghailani* requests the Convening Authority approve [REDACTED] as an expert consultant to aid the Defense as a forensic social worker to aid the Defense in rebutting the charges and constructing a sentencing case.
2. Qualifications: [REDACTED] is a forensic social worker in private practice in [REDACTED]. She has been in private practice since March 2003. She holds a Bachelor of Arts degree, with a major in Psychology and Women's Studies and a Masters of Social Work degree from the [REDACTED]. She is a Licensed Independent Clinical Social Worker in [REDACTED]. She has practiced in criminal justice and legal settings since 1994. She serves on the executive committee for the National Alliance of Sentencing Advocates and Mitigation Specialists, which is part of the National Legal Aid and Defender Association. She worked for the Committee for Public Counsel Services, [REDACTED] statewide public defender's office, in their juvenile unit, the Youth Advocacy Project, as the supervising social worker from 1997 until 2003. She began taking capital cases in 2001. Over the past 11 years she has prepared over 100 sentencing reports. Since March 2003, she has almost exclusively worked on death penalty mitigation investigations. She regularly participates in capital case trainings geared towards both mitigation specialists and attorneys. Since 2001, she worked on 18 capital murder cases, in which she has conducted extensive social history investigations, prepared social history reports, conducted psychosocial assessments, and assisted the attorneys in preparing for the penalty phase of trials. She has worked on two state cases, one in [REDACTED] and one in [REDACTED] and on 16 federal cases, which have been in [REDACTED], and [REDACTED].
3. Expert consultant's address and telephone number: [REDACTED]
[REDACTED]
4. Complete statement of reasons why the expert consultant is necessary:

In the recent case of *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008), the Court reaffirmed the framework for evaluating requests for expert assistance. The Court stated: "[S]ervicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense ... The mere possibility of assistance is not sufficient to prevail on the request ... Instead, the accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial. ... To establish the first prong, the accused 'must show (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.' *Id.* at 458 (internal quotations and citations omitted). 'A trial defense counsel who seeks the services of an expert consultant cannot play coy. He must show whatever cards he either thinks he holds or may acquire with such expert assistance.' *United States v. Tornowski*, 29 M.J. 578 (A.F.C.C.A. 1989).

a. Why an Expert is Needed

Mr. Ghailani is accused of, *inter alia*, conspiracy, murder of 11 individuals in violation of the law of war, and terrorism surrounding the bombing of the United States Embassy in Dar es Salaam, Tanzania, on August 7, 1998. Mr. Ghailani faces the maximum punishment of life in prison without parole. The Defense requires the assistance of an expert in mitigation to adequately advise and prepare our case in findings and sentencing. A mitigation expert with training and experience in investigating the life history of an accused and identifying issues needing further expert evaluation is necessary to ensure the Defense appropriately and adequately advises Mr. Ghailani and, if called upon, explores the appropriate issues and presents the appropriate case in both findings and sentencing. Open source documents indicate Mr. Ghailani was detained within an environment in which systemic abuse and prolonged isolation occurred and/or continues to occur, and that he was subjected to such abuse. Subjection to such abuse is a legitimate factor to present in mitigation and getting a person to fully disclose the nature and extent of such abuse requires a person trained in psychological counseling. These same source documents give us some information concerning Mr. Ghailani's country of origin; though scant, this information informs us that a full investigation will be needed to take into account his religious and socio-cultural heritage and how these factors affect the Defense case on such issues as intent and on sentencing. Mr. Ghailani has a right to have the panel consider these factors in evaluating the evidence both during findings and sentencing. R.M.C. 1004(b)(3).

b. What the Expert Will Do

██████████ will, *inter alia*, investigate Mr. Ghailani's familial and cultural background. Just looking at the unclassified summary of the CSRT indicates that there may be a significant amount of mitigating evidence to be uncovered. For example, on page 15, Mr. Ghailani discussed why he initially got involved with al Qaeda, particularly his desire to receive military training for self-defense purposes and his distrust of Tanzanian government training. The cultural factors at work in his desire for training and his distrust of the government must be investigated. Investigation of these factors could lead to important mitigation evidence for findings, relevant to elements such as intent, and for sentencing. He also discusses, on pages 7-11, his lack of knowledge regarding the plan to bomb the embassy. ██████████ investigation will look into cultural, familial and other background factors that could have impacted Mr. Ghailani's decision making process. To deny Mr. Ghailani the assistance of a forensic social worker, particularly ██████████, would deny Mr. Ghailani his right to a fundamentally fair trial. Finally, ██████████ will meet with Mr. Ghailani to explore the conditions of his confinement and the psychological impact upon Mr. Ghailani and whether this information should be presented as mitigation evidence during any sentencing proceedings. This investigation and development of this evidence is crucial to Mr. Ghailani's right to mount a full defense to the charges and to rebuff the Government's efforts to impose a penalty of life imprisonment against him.

c. Defense Counsel Cannot Perform the Services Requested

No member of the Defense trial team holds a degree or certification in social work, psychology, sociology, or medicine, nor have they had any specialized training in such fields or related investigatory matters. Simply put, there is no realistic way for defense counsel, regardless of the amount of study, to become proficient at the skills possessed by ██████████ as a result of her advanced degree in Social Work and her experience conducting psychosocial investigations concerning the criminally accused. No amount of studying treatises, interviewing experts or other types of preparation can prepare a defense counsel to conduct the work of a trained professional in psychology-related fields. To require such would be as unreasonable as asking a social worker to study up and present the case in court without having attended law school. Defense counsel have both dealt with psychological issues in previous trials and understand such resources as the DSM-IV in a manner necessary to integrate any findings into the trial

and to competently discuss these issues with the expert, but that is no substitute for years of training and experience in investigating and analyzing the type of information necessary to uncover mitigating evidence.

Additionally, without [REDACTED] as a consultant, the Defense would not have the ability to adequately advise Mr. Ghailani, nor the means to place the evidence before the military commission, should such occasion present itself, and present a defense. Counsel lacks the experience and scientific expertise to uncover all potentially mitigating events or factors in Mr. Ghailani's life. This difficulty would cause a fundamentally unfair trial because we could not effectively advise and/or represent Mr. Ghailani.

5. In accordance with M.C.R.E. 502, *Ake v. Oklahoma* 470 U.S. 68 (1985), *United States v. Toledo*, 25 M.J. 270 (CMA 1987) and *Garries*, supra, the Defense respectfully requests that the government provide an expert mitigation consultant to assist the Defense in assessing what factors may be relevant to the charges, and thus findings and sentencing, in this case. Timely appointment of an expert consultant will ultimately expedite this case and lead to the fair administration of justice. As such a mitigation expert is required from the earliest stage of trial preparation in order for the Defense to provide a unified theory for both the guilt and punishment phases of a trial. Furthermore, consultation with the expert consultant will be critical to decision-making in strategic issues for the case. The Defense requests an expert consultant be appointed as a representative of the Defense so any communications between the expert and any member of the Defense team will be privileged within the attorney-client privilege outlined in M.C.R.E. 502. See *United States v. Turner*, 28 M.J. 487, (C.M.A. 1989), *United States v. Gordon*, 27 M.J. (C.M.A. 1989), *Toledo*, supra.

6. The Defense is willing to accept a qualified and independent military member as a substitute to [REDACTED], if one exists. However, any expert must have comparable qualifications to [REDACTED] which are the kind of qualifications necessary for the defense of these allegations.

7. A forensic social worker is also an indispensable member of the Defense team throughout the proceedings. Forensic social workers possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse or abuse while in custody) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

8. Perhaps most critically, having a qualified forensic social worker as part of the Defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case. The social worker will compile a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyze the significance of the information in terms of impact on development, including effect on personality and behavior; find mitigating themes in the client's life history; identify the need for expert assistance; assist in locating appropriate experts; provide social history information to experts to enable them to conduct competent and reliable evaluations; and work with the Defense team and experts to develop a comprehensive and cohesive case in both findings and sentencing.

9. As a matter of due process, an accused is entitled to investigative or other expert assistance when necessary for an adequate defense. See *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A 1986). See

also *United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989) ("To assure that indigent defendants will not be at a disadvantage in trials where expert testimony is central to the outcome, the Supreme Court has ruled that a defendant must be furnished expert assistance in preparing his defense.") However, when an accused applies for the employment of an expert, he must demonstrate the necessity for the services. *Garries*, supra, at 290-91; R.M.C. 703 (d). In showing this necessity, "the defense (must be) specific enough in defining the issues they (hope) to develop with expert assistance (and must) demonstrate that they (have) sufficiently educated themselves as to such potential issues that might be developed with expert assistance." *United States v. Tornowski*, 29 M.J. 578, 580-81 (A.F.C.M.R. 1989). "An expert may be of assistance to the defense in two ways. The first is as a witness to testify. An expert also may be of assistance to the defense as a consultant to advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made." *Turner*, supra, at 488.

10. Since we are requesting an expert consultant, we are in need of exactly what *Turner* recognized when that court said such a consultant could "advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made." *Turner*, supra, at 488.

11. In order to fully perform her duties of an expert mitigation consultant, [REDACTED] would be required to travel to Guantanamo Bay, Cuba, along with potential trips to Mr. Ghailani's homeland in Tanzania and other potential countries in the Middle East. Such trips will range from one to two weeks in duration, at a billing rate [REDACTED]. In [REDACTED] experience, a typical case takes approximately one year to prepare and she provides [REDACTED] hours of work in preparation of such cases. Mr. Ghailani's case is not typical in any respect and preparation estimates range from [REDACTED] to cover both hours and travel-related expenses.

12. At this point, however, [REDACTED] that to initially meet with the client and assess the goals of her investigation, it would take approximately [REDACTED] hours. We are, therefore, requesting that you approve [REDACTED] hours for [REDACTED] so that she may meet with Mr. Ghailani, develop an understanding of the case and advise whether any further investigation would be beneficial. If she advises that further investigation is warranted, the Defense will submit an additional request to justify approval of further hours. The initial evaluation should provide significantly more specific information relevant to the Defense's burden to demonstrate why the expert is needed and what the expert would do.

13. Estimated Cost:

- a. Total hours and total cost: [REDACTED]
- b. Total days TDY at the per diem rate (such as travel days and casual status), if any: 3 days (one round trip to Guantanamo)
- c. Travel costs, if any: Cost of airfare from [REDACTED] to Washington, D.C. & hotel associated with trip to Guantanamo.
- d. Rate for professional services and hours/days (when travel is not involved): [REDACTED]
- e. Inconvenience fee, if any: None


14. Lastly, [REDACTED] understands she would need to apply for and successfully obtain a TS/SCI clearance in order to fully participate in this case. She is prepared to submit the requisite papers and

understands her communications with Mr. Ghailani are conditioned on such a clearance being granted. Due to the already limited time frame in this case proceeding to trial, the expedited approval of this request would assist in the processing [REDACTED] clearance papers and her timely assistance on this case. It will be absolutely imperative for [REDACTED] to speak with Mr. Ghailani in order to learn about his background and other information relative to her investigation.

15. Thank you for considering this request. If you have any questions, please call me at [REDACTED]
[REDACTED]

16. On 12 December 2008, I notified the opposing party via e-mail of this request.

Respectfully submitted,

By: 

LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]
[REDACTED]

Attachment:

1. *Curriculum vitae* [REDACTED], 3 pages

ATTACHMENT (1)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (E)



OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

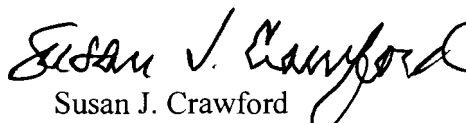
JAN 5 2008

CONVENING AUTHORITY

MEMORANDUM FOR: LtCol J.P. Colwell, USMC, Defense Counsel, OMC
MAJ R.B. Reiter, USAFR, Defense Counsel, OMC

SUBJECT: Request for Expert Consultant [REDACTED], *United States v. Ghailani*

I reviewed your 12 December 2008 request to employ [REDACTED] as an expert consultant. The Rule for Military Commission (R.M.C. 1004) you cited in your request as the source for Mr. Ghailani's rights deals strictly with capital cases. As Mr. Ghailani's case was referred as non-capital, the accused does not have the right to be "given broad latitude to present evidence in extenuation and mitigation." Further, you failed to demonstrate why denial of this expert consultant would result in a fundamentally unfair trial, as required by *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008), or why defense counsel, with the assistance of detailed investigators, is unable to present evidence in mitigation. Therefore, your 12 December 2008 request to employ [REDACTED] as an expert consultant is denied.


Susan J. Crawford
Convening Authority
for Military Commissions